SUPREME COURT, U. S.
FILED
MAY 29 1961
JAMES R. BROWNING, Clerk

No. ~~6884~~ 104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

—against—

COVENTRY WARE, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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COVENTRY WARE, INC.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Reliance Picture Frame Company (Reliance) respectfully asks that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit, for the reasons which follow:

Reports of the Opinions in the Courts Below

The opinion of the Court of Appeals is not yet officially reported. A copy of its opinion is appended hereto (1-A-9-A).

The opinion of the District Court is reported in 186 F. Supp. 798 (S.D.N.Y. 1960, Dawson, D.J.), and is printed in the record (15a-18a).

Grounds on Which the Jurisdiction of This Court Is Invoked

The jurisdiction of this court is invoked pursuant to Rule 19 (1) (b) of the Rules of this court, in that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court; the decision casts in doubt the meaning of certain provisions of the Copyright Statute.

The date of the judgment sought to be reviewed and the time of its entry is April 3, 1961, and is appended hereto (8-A-9-A).

The statutory provisions believed to confer on this court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. §1254 (1).

The Questions Presented for Review

The questions so presented are as follow:

(1) To effect and retain copyright in works of fine arts (17 U.S.C. §5(g)), must not some form of the notice of copyright specified in 17 U.S.C. §19 appear on the work of art itself; a fortiori, does not a purported notice of copyright which appears only on the back, permanent base, pedestal or substance on which the work is mounted, fail of compliance with the notice provision of such statute?

(2) Does not 17 U.S.C. §19 which specifies that the notice of copyright shall be affixed to each copy

of the work published or offered for sale require that the notice be inserted or impressed in or upon the work of art; ergo, does not a purported notice contained in a label placed on the back of the work with an adhesive substance fail to fulfill such statutory specification of affixing?

The Statutes, Regulation and Congressional Bills Involved in the Case

The pertinent statutes, regulation and 1906 Copyright Bills so involved are appended printed to this petition, and are as follows:

(1) 17 U.S.C. §5 (61 Statutes at Large 654);

(2) 17 U.S.C. §10 (61 Statutes at Large 656);

(3) 17 U.S.C. §19 (68 Statutes at Large 1032);

(4) Former 17 U.S.C. §19 (61 Statutes at Large 658);

(4) 35 Statutes at Large 1079 (March 4, 1909);

(6) 35 Statutes at Large 1076 (March 4, 1909);

(7) Copyright Bills of 1906 (H.R. 19853 and S. 6330, May 31, 1906);

(8) 22 Statutes at Large 181 (August 1, 1882);

(9) 35 Statutes at Large 1088 (March 4, 1909);

(10) 17 U.S.C. §20 (61 Statutes at Large 658);

(11) 17 U.S.C. §105 (61 Statutes at Large 662);

(12) 37 C.F.R. Ch. II, §202.8(a) (Regulation).

Statement of the Case

Coventry Ware, Inc. (Coventry) brought this action against Reliance for alleged infringements of five (5) purported copyrights, seeking money damages and other relief incidental thereto (2a-4a).

Reliance's answer denied generally the material allegations of the complaint and asserted separate defenses which, inter alia, attacked the validity of the purported notice of copyright (20a-23a).

The works involved are so-called decorative molded wall plaques (certified exhibit of plaque filed herewith).

The molded part, the work of art for which copyright is claimed, is a thin, flexible piece of plastic with a three dimensional design impressed thereon. The molded part is mounted on a firm composition backing whose sole function is as a brace.

The only purported notice of alleged copyright of the plaques is on a small eliptical label placed on the composition backing with an adhesive. No notice, wording, name, initials or other indication of proprietorship of any kind appears on the molded plastic work of art itself (15a-17a).

On cross-motions for summary judgment in the District Court, it was stipulated that the sole question with respect to Reliance's liability for admitted copying of said plaques is the validity of the purported notice of copyright in its aforesaid position on the plaques, as admitted by Coventry (15a, 16a).

The District Court directed judgment for Reliance (17a, 18a).

The Court of Appeals reversed the judgment of the District Court (1-A-9-A).

Jurisdiction of the District Court

The District Court had jurisdiction of the action pursuant to 28 U.S.C. §§1331, 1332 and 1338.

Argument for Allowance of the Writ

Since the Copyright Statute makes no express designation as to where, on works of fine arts, the copyright notice shall appear; and it is universally recognized and accepted that with respect to paintings and drawings, which are in the category of the works here involved, the name of the artist appears on the work of art itself, i.e., its face; and manufacturers and vendors of works of the type here involved may have been cast in potential liability by the decision of the Court of Appeals; and this case is of first impression with respect to such works of art, this court should settle the federal question here presented to it.

The Decision of the Court of Appeals Is Contrary to the Apparent Intent of Congress That the Notice of Copyright Shall Appear on the Work of Art Itself

17 U.S.C. makes express designation as to where the notice of copyright shall appear, only with respect to books, printed publications, periodicals and musical

works (§20). No comparable designation is made in the statute with respect to the numerous other copyrightable works set forth in 17 U.S.C. §5.

It is believed, however, that the statute persuasively infers that the notice shall appear somewhere on the work of art itself.

17 U.S.C. §10 provides for publication of a work with the notice of copyright required by Title 17 affixed to each copy thereof.

§19, setting forth the form of the notice, provides an alternative form with respect to copies of works specified in 17 U.S.C. §5(f) to (k), inclusive, and significantly, distinguishes between such copies and their accompaniments, as follows:

> "* * * *Provided* (italics in original), That on some accessible portion of such copies *or* of the margin, back, permanent base, or pedestal, or of the substance on which *such copies* shall be mounted, his name shall appear * * *" (Emphasis supplied).

Were the notice not required to be affixed to the work of art itself, there would be no need for a provision for the alternative form of notice with respect to the works specified.

It was the apparent intent of Congress, by the provision for the alternative form of notice with respect to the works specified, to minimize possible disfigurement thereof. The terms of the provision for the alternative form of notice are a clear indication

of the necessity that some form of notice appear on the work of art itself.

Further support for this view is afforded upon examination of 17 U.S.C. §19 as it existed prior to its amendment in 1954, and its predecessor section, 35 Statutes at Large 1079.

22 Statutes at Large 181 and the Copyright Bills of 1906, the source of the Copyright Statute of 1909, each contained permissive provisions for placing the notice of copyright in a place other than on the work of art itself. The Copyright Statute of 1909 repealed all prior inconsistent statutes affecting copyrights (35 Statutes at Large 1088).

The failure to incorporate in 35 Statutes at Large 1079, and amendments and re-enactments thereof to the present time, such permissive provisions of the Copyright Bills of 1906 or 22 Statutes at Large 181 strengthens the conclusion that the work of art itself is required to have the notice of copyright thereon.

This case appears to be of first impression with respect to where on works of art of the type here involved the notice of copyright shall appear. Such works are in the category of fine arts, such as paintings, drawings and sculpture, and so recognized and accepted universally and by the Regulations of the Copyright Office (37 C.F.R. Ch. II, §202.8(a)).

From time immemorial, the name of the painter, if it appears at all, appears on the face of the drawing or painting, which is the work of art itself. The registration form promulgated by the Copyright Office, with respect to prints and pictorial illustrations under 17

U.S.C. §5(k), works very similar to those here in question, specifies (at page 4) that the notice of copyright should appear on the face of the work, in apparent recognition of the universal understanding with respect to such works (23).

Furthermore, the Regulations (37 C.F.R., Ch. II, §202.8(a)) specify that works of art (17 U.S.C. §5(g)) are protected as to their form but not their mechanical or utilitarian aspects. 37 C.F.R., Ch. II, §202.8(a) is cited with approval in *Mazer* v. *Stein,* 347 U.S. 201, 218.

The decision of the Court of Appeals, appearing to be contrary to the intent of the notice sections of the Copyright Statute, exposes to potential liability manufacturers and vendors of works of art of the type here involved who have relied on the universally recognized custom and usage aforesaid as being expressive of the law with respect thereto.

It would seem that the cases which follow, cited by the Court of Appeals in its decision of reversal, have application only to their own facts.

In *Peter Pan Fabrics, Inc. et ano.* v. *Martin Weiner Corp.*, 287 F. (2d) 487 (C.C.A. 2) January 27, 1960, wherein the defendant appealed from a preliminary injunction, an ornamental design was imprinted on cloth sold for eventual manufacture into dresses. A notice of copyright was imprinted on the selvage of the cloth, being repeated for each repetition of the design. When the dress manufacturers (not connected with the plaintiff vendor of the cloth) made the cloth into dresses, the notice either was cut off or sewn into the dresses so that it could not be seen.

A majority of the court held that the burden was on the defendant copyist to show that the notice could have been embodied in the design without impairing the market value of the cloth, and that whatever may be shown at the trial, the design should be protected pendente lite.

In a vigorous dissent from the majority, Circuit Judge Friendly held that Congress had not accompanied the broadening of the subjects of copyright with a relaxation of the notice requirement.

It should be observed that the majority of the court impliedly recognized that the notice ordinarily should be on the work of art itself, by affording the copyist the opportunity of proof of non-impairment of market value at the trial.

The decision appears to rest on the practical difficulty of affixing the notice on a work of art imprinted on cloth for dresses, in an industry where piracy is rampant, styling ephemeral and distaff approval at best uncertain.

To the same effect as *Peter Pan Fabrics, Inc. et ano.* v. *Martin Weiner Corp.*, supra, and all involving textiles with notice of copyright on the selvage, are *Peter Pan Fabrics, et ano.* v. *Dixon Textile Corp.*, 280 F. (2d) 800 (C.C.A. 2) May 18, 1960; *Peter Pan Fabrics, Inc. et ano.* v. *Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y.) June 21, 1960, and *H. A. Kolbe Co., Inc.* v. *Armgus Textile Co., et al.*, 184 F. Supp. 423 (S.D. N.Y.) April 28, 1960; aff'd 279 F. (2d) 555 (C.C.A. 2).

In *Boucher, etc., et ano.* v. *DuBoyes, Inc., et al.*, 253 F. (2d) 948 (C.C.A. 2) April 7, 1958; cert. denied.

357 U.S. 936, a pair of costume jewelry earrings had the notice of copyright on only one of the earrings. The manufacturer invariably sold the earrings in pairs and each pair was considered as a unit. As to a necklace, also involved, the notice was on one of the integral parts thereof. The court held the notice valid.

In *Scarves by Vera, Inc.* v. *United Merchants and Manufacturers, Inc., et al.*, 173 F. Supp. 625 (S.D. N.Y.) June 8, 1959, a notice of copyright for a design on ladies blouses was on a woven label sewn into a side seam adjacent to the bottom opening of the garment. The notice was held to meet the statutory requirement.

In *Trifari, Krussman & Fishel, Inc.* v. *Charel Co., Inc., et ano.*, 134 F. Supp. 551 (S.D.N.Y.) September 28, 1955, the notice of copyright was located on the clasp of a beaded necklace, the place where, according to the custom and usage in that industry, the name of the maker of the article usually appears. In holding the copyright infringed and the notice valid, the court stated that the nature of the article was such that the area in which the notice could be placed was necessarily limited.

Again, there appears the inference by the court that the notice must appear on the work of art itself, but such placement was apparently excused because of the physical limitations of the article involved.

In *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co.*, 161 F. (2d) 406 (C.C.A. 2) December 10, 1946; cert. denied, 331 U.S. 820, the contents or wording of

the notice did not literally comply with the statute as to the form of the notice. The Court held there was substantial compliance with the statutory requirement and the copyright infringed.

In *Fleischer Studios, Inc., et al.* v. *Ralph A. Freundlich, Inc.*, 73 F. (2d) 276 (C.C.A. 2) November 5, 1934; cert. denied, 294 U.S. 717, the notice on a copyrighted "Betty Boop" doll omitted the corporate designation, "Inc.", from the copyright proprietor's name. The court held the identification of the copyright proprietor sufficient and the copyright infringed.

It would seem that articles of wearing apparel such as dresses, blouses and costume jewelry are subjects unto themselves and bear no reasonable relation to works of fine arts, so far as problems of styling, marketability and public demand are concerned.

There is ordinarily nor here no physical difficulty in placing the notice of copyright on the works of fine arts themselves, and such placement is in accord with universal custom and usage.

With respect to the requirement of 17 U.S.C. §10, that the notice shall be "affixed", it is noted there is no definition of the word "affixed" in the statute.

Again by inference, it seems the statute requires the notice to be inserted or impressed in or upon the work of art itself for 17 U.S.C. §105, in providing criminal penalties for certain violations of the statute, speaks of fraudulently inserting or impressing a notice of copyright.

When it is remembered that filing of a registration of a claim to copyright can be delayed for as long as 14 months after first publication (*Pearson* v. *Washingtonian Publishing Co.*, 306 U.S. 30) without loss of the right thereto, assurance, that each copy of the work from the time of the first sale to the date of registration and thereafter bore the notice, is far less when the notice appears on a label placed on the work with an adhesive than when inserted or impressed as by a dye in the manufacturing process.

Here, the claims of copyright were registered between 11 months and one year after the first sale (certified Exhibit folder of registrations filed herewith).

A monopoly with respect to the manufacture and sale of a household item ought not to be granted on the chance that a notice was affixed to each and every copy of the item sold, when more reasonable assurance thereof can be exacted without undue burden on the manufacturer.

Conclusion

The decision of the Court of Appeals appears contrary to the intent of Congress and exposes manufacturers and vendors of works of the type here involved to potential liability. The question has not been settled by this court and the Writ should be granted.

Respectfully submitted,

RAYMOND A. WERCHEN
Counsel for Petitioner

Pertinent Statutes, Regulation, and Copyright Bills

(1) TITLE 17, UNITED STATES CODE, §5 (61 Statutes at Large 654)

"§5. Classification of works for registration

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopedic works, directories, gazetteers and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.

(e) Musical compositions.

(f) Maps.

(g) Works of art; models or designs for works of art.

(h) Reproductions of a work of art.

(i) Drawings or plastic works of a scientific or technical character.

(j) Photographs.

(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.

(l) Motion picture photoplays.

(m) Motion pictures other than photoplays.

The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, nor shall any error in classification invalidate or impair the copyright protection secured by this title."

(2) TITLE 17, UNITED STATES CODE, §10 (61 Statutes at Large 656)

"§10. Publication of work with notice

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title."

(3) TITLE 17, UNITED STATES CODE, §19 (68 Statutes at Large 1032)

"§19. Notice; form

The notice of copyright required by section 10 of this title shall consist either of the word 'Copyright', the abbreviation 'Copr.', or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C

enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor; *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: 'Entered according to Act of Congress, in the year——, by A.B., in the office of the Librarian of Congress, at Washington, D.C.', or, at his option, the word 'Copyright', together with the year the copyright was entered and the name of the party by whom it was taken out; thus, 'Copyright, 19——, by A.B.' "

(4) FORMER TITLE 17, UNITED STATES CODE, §19 (61 Statutes at Large 658)

"§19. Notice; form

The notice of copyright required by section 10 of this title shall consist either of the word 'Copyright' or the abbreviation 'Copr.', accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram,

mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: 'Entered according to Act of Congress, in the year——, by A.B., in the office of the Librarian of Congress, at Washington'; or, at his option, the word 'Copyright', together with the year the copyright was entered and the name of the party by whom it was taken out; thus, 'Copyright, 19——, by A.B.'"

(5) 35 STATUTES AT LARGE 1079 (Act of March 4, 1909, eff. July 1, 1909)

"SEC. 18. That the notice of copyright required by section nine of this Act shall consist either of the word 'Copyright' or the abbreviation 'Copr.', accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section five of this Act, the notice may consist of the letter C enclosed within a circle, thus: ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: Provided, That on some accessible portion of such copies or of the

margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four."

(6) 35 STATUTES AT LARGE 1076 (Act of March 4, 1909, eff. July 1, 1909)

"SEC. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

(b) Periodicals, including newspapers;

(c) Lectures, sermons, addresses, prepared for oral delivery;

(d) Dramatic or dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art; models or designs for works of art;

(h) Reproductions of a work of art;

(i) Drawings or plastic works of a scientific or technical character;

(j) Photographs;

(k) Prints or pictorial illustrations:

Provided, nevertheless, That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

(7) COPYRIGHT BILLS OF 1906 (S. 6330 and H.R. 19853, 1st Session, 59th Congress, Introduced May 31, 1906)

"SEC. 14. That the notice of copyright required by section nine shall consist either of the word 'Copyright', or the abbreviation 'Copr.', or, in the case of any of the works specified in subsections (f) to (l), inclusive, of section five of this Act, the letter C inclosed within a circle, thus: ©, accompanied in every case by the name of the author or copyright proprietor as registered in the Copyright Office; or, in the case of works specified in subsections (f) to (l), inclusive, of section five of this Act, by his initials, monogram, mark, or symbol, provided that on some accessible portion of the work or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted his name shall appear. But in the case of works in which copyright is subsisting when this Act shall go into effect, the notice of copyright may be either in one of the forms prescribed herein or in one of those prescribed by the Act of June eighteenth, eighteen hundred and seventy-four.

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title-page or the page immediately following, or, if a periodical, either upon the title-page or upon the first page of text of each separate number or under the title heading; or if a work specified in subsections (f) to (l), inclusive, of section five of this Act, upon some accessible portion of the work itself or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted.

In a composite work one notice of copyright shall suffice.

Upon every copy of a published musical composition in which the right of public performance is reserved there shall be imprinted under the notice of copyright the words, 'Right of public performance reserved;' in default of which no action shall be maintained nor recovery be had for any such performance although without the consent of the copyright proprietor."

(8) 22 Statutes at Large 181 (August 1, 1882)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed by section forty-nine hundred and sixty-two of the Revised Statutes, and acts additional thereto, upon the back or bottom of such articles, or in such other place upon them as it has here-

tofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon."

(9) 35 STATUTES AT LARGE 1088 (Act of March 4, 1909, eff. July 1, 1909)

"Sec. 63. That all laws or parts of laws in conflict with the provisions of this Act are hereby repealed, but nothing in this Act shall affect causes of action for infringement of copyright heretofore committed now pending in courts of the United States, or which may hereafter be instituted; but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

(10) TITLE 17, UNITED STATES CODE, §20 (61 Statutes at Large 658)

"§20. Same; place of application; one notice in each volume or number of newspaper or periodical

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice."

(11) TITLE 17, UNITED STATES CODE, §105 (61 Statutes at Large 662)

"§105. Fraudulent notice of copyright, or removal or alteration of notice.

Any person who, with fraudulent intent, shall insert or impress any notice of copyright required by this title, or words of the same purport, in or upon any copyrighted article or with fraudulent intent shall remove or alter the copyright notice upon any article duly copyrighted, shall be guilty of a misdemeanor, punishable by a fine of not less than $100 and not more than $1000. Any person who shall knowingly issue or sell any article bearing a notice of United States copyright which has not been copyrighted in this country, or who shall knowingly import any article bearing such notice or words of the same purport, which has not been copyrighted in this country, shall be liable to a fine of $100."

(12) 37 C.F.R., CH. II, §202.8 (a), AS AMENDED TO OCTOBER 27, 1959

"§202.8. Works of Art (Class G)-(a) In General. This class includes works of artistic craftsmanship, in so far as their form but not their mechanical or utilitarian aspects are concerned, such as artistic jewelry, enamels, glassware, and tapestries, as well as all works belonging to the fine arts, such paintings, drawings and sculpture. Works of art and models or designs for works of art are registered in Class G on Form G, except published three-dimensional works of art which require Form GG."

Application for Registration of a Claim to Copyright in a Print or Pictoral Illustration

(OFFSETS)

[*For convenience of Court and Counsel this Document is bound in on the opposite page.*]

Application for Registration of a Claim to Copyright
in a print or pictorial illustration

CLASS K | REGISTRATION NO | DO NOT WRITE HERE

Instructions: Make sure that all applicable spaces have been completed before you submit the form. The application must be *signed* at line 11. The application should not be submitted until after the date of publication given in line 6 (a), and should state the facts which existed on that date. For further information, see page 4.

Pages 1 and 2 should be typewritten or printed with pen and ink. Pages 3 and 4 should contain exactly the same information as pages 1 and 2, but may be carbon copies.

Mail all pages of the application to the Register of Copyrights, Library of Congress, Washington 25, D. C., together with 2 copies of the best edition of the work (or if appropriate, photographs—see line 4) and the registration fee of $4. Make your remittance payable to the Register of Copyrights.

1. Copyright Claimant(s) and Address(es): Give the name(s) and address(es) of the copyright owner(s). Ordinarily the name(s) should be the same as in the notice of copyright on the copies deposited. If initials are used in the notice, the name should be the same as appears elsewhere on the copies.

Name .....

Address .....

Name .....

Address .....

2. Title:

(Give the title of the work as it appears on the copies; each copy deposited should bear an identifying title)

3. Nature of Work:

(Characterize the general type of artistic work involved as, for example, painting, drawing, sculpture, design, model, etc.)

4. Optional Deposit: (Space 4 should be filled in *only* if the work is published and photographs are deposited in lieu of copies. See instructions on page 4 and accompanying insert).

Basis for claiming option. Check and fill in *one* of the following:

[ ] Monetary value (retail value per copy) ..... [ ] Weight (in pounds) .....

[ ] Size (give dimensions) .....

[ ] Fragility (give details) .....

5. Author of the Print or Reproduction: Citizenship and domicile information must be given. Where a work is made for hire, the employer is the author. The citizenship of organizations formed under U. S. Federal or State law should be stated as U. S. A. If the copyright claim is based on new matter (see line 7) give information about the author of new matter.

Name ..... Citizenship ..... (Name of country)

Domiciled in U. S. A. Yes [ ] No [ ] Address .....

6. Publication and Manufacture:

(a) Date of Publication: Give the date when copies of this print or illustration were first placed on sale, sold, or publicly distributed. (NOTE: the full date (month, day, and year) must be given.

.....

(b) Place of Publication: Give the name of the country in which this print or illustration was first published.

.....

(c) Manufacture Outside United States: If the copies of this print or illustration were manufactured outside the United States by lithographic or photoengraving process, give the name of the country of manufacture.

.....

7. New Matter in This Version: (NOTE: Leave this line blank unless the instructions apply to your work.)

If any substantial part of this work has been previously published, give a brief, general statement of the nature of the new matter in this version. New matter may consist of compilation, revision, and the like, as well as additional pictorial or graphic work.

.....

Complete all applicable spaces on next page

9. Name and address of person or organization to whom correspondence and refund, if any, should be sent:

Name ..... Address .....

10. Send certificate to:

(Type or print name and address)

Name .....

Address .....
(Number and street)

.....
(City) (Zone) (State)

11. Certification: (NOTE: Application not acceptable unless signed)

I CERTIFY that the statements made by me in this application are correct to the best of my knowledge

.....
(Signature of copyright claimant or duly authorized agent)

Application Forms

Copies of the following forms will be supplied by the Copyright Office without charge upon request:

Class A — Form A—Published book manufactured in the United States of America.

Class A or B —
- Form A-B Foreign—Book or periodical manufactured outside the United States of America (except works subject to the ad interim provisions of the copyright law).
- Form A-B Ad Interim—Book or periodical in the English language manufactured and first published outside the United States of America.

Class B —
- Form B—Periodical manufactured in the United States of America.
- Form BB—Contribution to a periodical manufactured in the United States of America.

Class C — Form C—Lecture or similar production prepared for oral delivery.

Class D — Form D—Dramatic or dramatico-musical composition.

Class E —
- Form E—Musical composition the author of which is a citizen or domiciliary of the United States of America or which was first published in the United States of America.
- Form E Foreign—Musical composition the author of which is not a citizen or domiciliary of the United States of America and which was not first published in the United States of America.

Class F — Form F—Map.

Class G — Form G—Work of art or a model or design for a work of art.

Class H — Form H—Reproduction of a work of art.

Class I — Form I—Drawing or plastic work of a scientific or technical character.

Class J — Form J—Photograph.

Class K —
- Form K—Print or pictorial illustration.
- Form KK—Print or label used for an article of merchandise.

Class L or M —
- Form L-M—Motion Picture.

Form R—Renewal copyright.

Form U—Notice of use of musical composition on mechanical instruments.

FOR COPYRIGHT OFFICE USE ONLY

Application received

Two copies received

Photographs or reproductions received

Fee received

Deposit

Renewal

Registration of a Claim to Copyright
in a print or pictorial illustration

CLASS **K** REGISTRATION NO. DO NOT WRITE HERE

This is To Certify that the statements set forth on this certificate have been made a part of the records of the Copyright Office. In witness whereof the seal of the Copyright Office is hereto affixed.

Register of Copyrights
United States of America

1. Copyright Claimant(s) and Address(es):

Name .....

Address .....

Name .....

Address .....

2. Title:

.....
(Title of the work)

3. Nature of Work:

.....

4. Optional Deposit:

Basis for claiming option:

☐ Monetary value (retail value per copy) ..... ☐ Weight (in pounds) .....

☐ Size (give dimensions) .....

☐ Fragility (give details) .....

5: Author of the Print or Reproduction:

Name ..... Citizenship .....
(Name of country)

Domiciled in U. S. A. Yes ☐ No ☐ Address .....

6. Publication and Manufacture:

(a) Date of Publication:

.....

(b) Place of Publication:

.....

(c) Manufacture Outside United States:

.....
(Name of country)

7. New Matter in This Version:

.....

Complete all applicable spaces on next page

Name Address

10. Send certificate to:

(Type or print name and address)

Name .....

Address .....
(Number and street)

.....
(City) (Zone) (State)

Information concerning copyright in prints and pictorial illustrations

When To Use Form K. Form K is appropriate for published prints and pictorial illustrations.

What Is a "Print or Pictorial Illustration"? This category (Class K) includes prints and pictorial illustrations produced by lithography, photoengraving, or other methods of reproduction. Examples: greeting cards, picture postcards, calendar illustrations, and the like.

Unpublished Works. A work cannot be registered as a "print or pictorial illustration" in unpublished form. Unpublished works are protected at common law against unauthorized use prior to publication.

Duration of Copyright. Statutory copyright in published prints and pictorial illustrations lasts for 28 years from the date of first publication, and may be renewed for a second 28-year term.

How to secure statutory copyright in a print or pictorial illustration

First. Produce Copies With Copyright Notice. Produce the print or illustration in copies by printing or other means of reproduction. To secure copyright, it is essential that the copies bear a copyright notice in the required form and position, as explained below.

Second. Publish the Work With Copyright Notice. The copyright law defines the "date of publication" as ". . . the earliest date when copies . . . were placed on sale, sold, or publicly distributed."

Third. Register Your Copyright Claim. Promptly after publication, mail to the Register of Copyrights, Library of Congress, Washington 25, D. C., two complete copies of the print or illustration as published with notice, an application on Form K, properly completed and signed, and a fee of $4. NOTE: Photographs may be deposited instead of actual copies under certain circumstances; see optional deposit instructions.

The Copyright Notice. The copyright notice for prints and pictorial illustrations should appear on the face of the work, or, if the work is a portfolio or collection of prints in book form, on the title page or verso thereof. It should ordinarily consist of the word "Copyright," the abbreviation "Copr.," or the symbol ©, accompanied by the name of the copyright owner. The year date of publication may be included in the notice, but normally it is not required unless the work could also be regarded as a "book."

Alternative Form of Notice. As an alternative, the notice for prints and illustrations may consist of the symbol ©, accompanied by the initials, monogram, or mark of the copyright owner, provided the owner's name appears on some accessible part of the copies.

Universal Copyright Convention Notice. Use of the symbol © with the name of the copyright owner and the year date of publication may result in securing copyright in countries which are parties to the Universal Copyright Convention. Example: © John Doe 1958.

Optional Deposit. For certain published works, it may be impractical to deposit actual copies because of their size, weight, fragility, or monetary value. In such cases the Register of Copyrights may permit the deposit of photographs or other reproductions instead of the actual copies, under conditions specified in the Copyright Office Regulations. If the optional form of deposit is used, it will be necessary (1) to fill out line 4 on pages 1 and 4, and (2) to deposit photographs or other identifying reproductions of the work. Detailed instructions regarding the optional deposit appear on the accompanying insert sheet.

NOTE: It is the act of publication with notice that actually secures copyright protection in a print or pictorial illustration. If copies are published without the required notice, the right to secure copyright is lost, and cannot be restored.

FOR COPYRIGHT OFFICE USE ONLY

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—October Term, 1960.

(Argued February 16, 1961 Decided April 3, 1961.)

Docket No. 26643

COVENTRY WARE, INC.,

Plaintiff-Appellant,

—v.—

RELIANCE PICTURE FRAME COMPANY,

Defendant-Appellee.

Before:

LUMBARD, *Chief Judge,*

and CLARK and SMITH, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge.*

Plaintiff Coventry Ware, Inc., appeals from a summary judgment for defendant Reliance Picture Frame Company in an action for infringement of plaintiff's copyrighted sculptured wall plaque. Judgment reversed and action remanded. Opinion below reported in D. C. S. D. N. Y., 186 F. Supp. 798.

Opinion of Court of Appeals

JAMES B. BOYER, New York City (Albert H. Oldham, of Oldham & Oldham, Akron, Ohio, on the brief), *for plaintiff-appellant.*

RAYMOND A. WERCHEN, New York City, for *defendant-appellee.*

CLARK, *Circuit Judge*:

Plaintiff, a corporation engaged in the manufacture and sale of wall plaques, caused certain wall plaques to be designed by an artist and then registered them as "Molder Sculpture" with the Register of Copyrights. The plaques contained a colored, three-dimensional, but relatively flat, design, and were intended as decorative features for walls. The plaques were made by pressing a mold in plastic, and were completed with a rigid backing sheet so that the component parts formed an integral whole which could be attached to a wall and displayed. Defendant admitted copying plaintiff's plaques and selling them at a lower price. In this action for infringement, its only defense is the alleged invalidity of the copyright notice, which appeared on a small printed label firmly attached to the *back of the plaques*. Defendant's position is that notice of copyright must appear on the front of the work of art, and that a notice appearing on the back is insufficient. The District Court, accepting this contention, granted summary judgment to the defendant, and plaintiff appeals. Judge Dawson's opinion is reported in D. C. S. D. N. Y., 186 F. Supp. 798.

The relevant sections of the Copyright Act, 17 U. S. C. §§1 *et seq.*, are section 10, section 19, which deals with the form of notice, and section 20, which prescribes the location of the notice in certain instances.

The basic notice requirement is set forth in 17 U. S. C. §10, as follows:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof * * *."

The form of the notice required by section 10 is set forth in 17 U. S. C. §19 and "shall consist either of the word 'Copyright,' the abbreviation 'Copr.,' or the symbol ©, accompanied by the name of the copyright proprietor and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication."

Section 19 then goes on to authorize an optional "short form" of notice which may be used on works of art and other items set forth in 17 U.S.C. §5(f)-(k) as an alternative to the general form of notice described above. Such "short form" notice "may consist of the letter C enclosed within a circle, thus ©, *accompanied by the initials*, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base or pedestal, or of the substance on which such copies shall be mounted, his name shall appear."

Section 20 prescribes the place where the notice is to appear in the case of books or other printed publications, periodicals, and musical compositions. It places no limitations on the possible location of notice in the case of works of art and kindred items, pro-

vided that the notice complies with the general requirement of section 10 that the notice be affixed to each copy. Defendant contends, however, that a limitation on the permissible location of notice for works of art may be found by implication from section 19. Defendant reasons that the short-form notice allowed by section 19 is intended to minimize the disfigurement which would result if the long form were used. In order to prevent the short form from being mere surplusage, defendant concludes, we must assume that the long form could be used only where it disfigured the work of art—i.e., on the front. Defendant does not explain, however, why Congress would have enacted a copyright law requiring disfiguring notices on the front when a nondisfiguring notice on the back would give equally adequate warning to prospective copyists. Neither does defendant say why, if any limitations on placement were intended with respect to works of art, they were not set forth in section 20, whose specific subject is location of the notice.

It should be noted that section 20 is the culmination of a long history of increasing liberalization of restrictions on the placement of notice. In the case of books and musical compositions, the placement of notice has always been rigidly and narrowly confined. But in the case of other items, a series of revisions have steadily expanded the permissible locations of notice. The acts of 1802, 2 Stat. 171, and of 1831, 4 Stat. 436, 437, both required notice to be "on the face" of nonbook and nonliterary items. This harshly restrictive requirement was abated slightly in the revision of 1870, 16 Stat. 198, 214, which provided that in the case of "a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing,

chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts," the notice must be placed "upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted."

The act of 1874, 18 Stat. 78, 79, completely eliminated all references to "face or front," and required instead only that in the case of the items specified above the notice appear "upon some visible portion thereof, or of the substance on which the same shall be mounted." Even this liberalized requirement was apparently thought too restrictive, however, since Congress added a special section in 1882, 22 Stat. 181, permitting "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright" to place the notice "upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual * * * to employ for the placing of * * * trade marks thereon."

The original House and Senate bills leading to the Copyright Act of 1909 continued the century old practice of prescribing the possible location of notice, but they expanded still further the number of such locations. Section 14 of H. R. 19853 and S. 6330, 59th Cong., 1st Sess. (1906), provided that in the case of maps, works of art, models or designs for works of art, reproductions of a work of art, etc., the notice "shall be applied * * * upon some accessible portion of the work itself or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted." In the act as finally passed, however, 35 Stat. 1075, 1079 (1909), a specific requirement for location of notice was retained only

in the case of books or other printed publications, musical compositions, and periodicals. All other items were left subject only to the general requirement, now embodied in 17 U. S. C. §10, that notice be affixed to each copy.

In the light of this legislative history it is surely incredible that Congress would have intended, by implication hidden in section 19, to revive the requirement of the 1802 and 1831 acts that notice appear on the front. All the copyright legislation of the nineteenth century had prescribed in unambiguous the permissible location of notice, and the 1909 revision contained a section dealing specifically with the location of notice and prescribed such location only for three types of items. Thus the failure to limit the placement of notice for other items does not arise from any lack of familiarity with the drafting devices necessary to accomplish that result. Section 19 should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.

Defendant's restrictive view of section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the "front" of the work of art. This court and the District Court for the Southern District of New York have recently rendered a number of decisions upholding copyrighted works of art on dress fabric where the notice appeared on the selvage or margin of the fabric, rather than on the design itself. *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487; *Peter Pan Fabrics, Inc.* v. *Dixon Textile Corp.*, 2 Cir., 280 F. 2d 800, 802; *Peter Pan Fabrics, Inc.* v. *Candy Frocks, Inc.*, D. C. S. D. N. Y., 187 F. Supp. 334; *H. M. Kolbo Co.* v.

Armgus Textile Co., D. C. S. D. N. Y., 184 F. Supp. 423, affirmed 2 Cir., 279 F. 2d 555. We have also sustained a copyright on a pair of earrings, though the notice was stamped upon only one earring of a pair. *Boucher* v. *Du Boyes, Inc.*, 2 Cir., 253 F. 2d 948, certiorari denied 357 U. S. 936. In *Scarves by Vera, Inc.* v. *United Merchants & Mfrs., Inc.*, D. C. S. D. N. Y., 173 F. Supp. 625, works of art contained on ladies' blouses were copyrighted by a notice upon a label sewed into a side seam. Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc.* v. *Charel Co.*, D. C. S. D. N. Y., 134 F. Supp. 551, 554, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: "It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements." See also *Shapiro, Bernstein & Co.* v. *Jerry Vogel Music Co.*, 2 Cir., 161 F. 2d 406, certiorari denied 331 U. S. 820; *Fleischer Studios* v. *Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, certiorari denied *Ralph A. Freundlich, Inc.* v. *Fleischer Studios*, 294 U. S. 717.

Defendant also suggests that the notice, having been pasted on by a gummed label, was not "affixed" within the meaning of section 10. We find that it was "affixed." The point does not require discussion.

On remand it would seem appropriate that the court grant the plaintiff's motion for summary judgment, since the defendant has admitted copying plaintiff's plaques. We shall leave to the District Court the settling of appropriate remedies.

Judgment reversed and action remanded for proceedings in accordance with this opinion.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of April one thousand nine hundred and sixty-one.

Present: HON. J. EDWARD LUMBARD,
Chief Judge,

HON. CHARLES E. CLARK,
HON. J. JOSEPH SMITH,
Circuit Judges.

COVENTRY WARE, INC.,
Plaintiff-Appellant,

v.

RELIANCE PICTURE FRAME COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Judgment of Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and that the action be and it hereby is remanded for proceedings in accordance with the opinion of this court; with costs to the appellant.

A. DANIEL FUSARO,
Clerk

Endorsed:

United States Court of Appeals
Second Circuit

Filed April 3, 1961

A. Daniel Fusaro, Clerk

FILED
JUN 15 1961
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

No. ~~934~~ 104
OCTOBER TERM, 196~~0~~1.

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

against

COVENTRY WARE, INC.,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

ALBERT H. OLDHAM,
OLDHAM & OLDHAM,

825 First National Tower,
Akron 8, Ohio,

Counsel for Respondent.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

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In the Supreme Court of the United States

No. 984.

OCTOBER TERM, 1960.

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

against

COVENTRY WARE, INC.,

Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR CERTIORARI.

This is a copyright infringement action brought by way of Summary Judgment against admitted copying and admitted infringement of a particularly piraical nature. The case involves only the issue of validity of notice of copyright on works of art.

As a belated de ense for its actions petitoner has attempted to muddy clear waters. Petitioner ses problems where none exist.

The carefully considered opinion of the Court of Appeals for the Second Circuit in the case at bar (p. 19, *infra*) cuts through the loose reasoning of petitioner and sharply restates the well known and long followed practice in marking works of art with copyright notice. There is no problem here. No valid reason appears to exist under the rules and decisions of this Court for granting a petition for a Writ of Certiorari.

RESPONDENT'S STATEMENT OF QUESTIONS PRESENTED.

1. Is there any reason to upset the broad marking provisions of 17 U. S. C. Sec. 10 with respect to applying notice of copyright by affixing it to each copy of the work published?

2. How can something not in Sec. 10 be read into it when 17 U. S. C. Sec. 20 relating to position of notice on the published work specifically states where notice must be placed only with respect to books, periodicals, and musical compositions, but with Sec. 20 placing no limitation on possible location of notice in the case of works of art?

3. Should the copyright law be burdened with any requirement that attempts to dissect an article sold as an integral whole, such dissection attempting to say that the statue of David by Michelangelo is the work of art and the integral base on which David stands is not, or which attempts to say that in an integral wall plaque only the molded face is the work of art and not the supporting back?

4. Should the copyright law be further burdened with an interpretation of the language of 17 U. S. C. Sec. 10 that "affixed to each copy" means inserted or impressed in or upon a work of art when the dictionary definition says affix means "to affix a stamp to an envelope"?

5. How can petitioner at this late date successfully contend that the intent of Congress in passing the 1909 Copyright Act was something other than the clear language of the statute, and something other than the practice followed by the Copyright Office and the trade for fifty years?

STATEMENT OF FACTS.

Respondent is a small manufacturer and distributor of high quality artistic goods to the department store and gift shop trade. Petitioner is a considerably larger manufacturer and distributor of picture frames and wall plaques to the ten cent store and chain store trade.

Respondent's copyrighted wall plaques are beautiful and distinctive. They measure 9½" wide, 24" high and ½" thick, and sell in gift shops, etc., for $14.00 a pair. The cheap, small, but almost identical copies of these plaques made by petitioner sold in the ten cent stores for $1.98 each and are one-half the area. That petitioner killed respondent's business in these items is evident.

The Construction of Respondent's Wall Plaques and the Place and Form of Notice: Each of respondent's copyrighted wall plaques has a pressed plastic face portion made from thin vinyl plastic sheet having a thickness of only two hundredths of an inch (.020"), this sheet being formed under heat and pressure to provide in intaglio or relief the desired three-dimensional artistic design. The four edges of the plastic sheet are simultaneously shaped to interestingly contoured rearwardly extending flanges giving a shallow box-like shape to the molded plastic face sheet. Received inside the most rearward edges of the flanges of the face sheet is a Masonite or pressed wood backing sheet which is rigid and strong, being ⅛ inch thick and completely covering the back of the face sheet but spaced from the plane thereof by the rearward depth of the flanges. A number of small molded plastic spacer cups, such as eight, each about an inch in diameter and one-half inch thick, are cemented with high strength cement between the inside of the flat portions of the facing sheet and the backing sheet of Masonite and the edges of

the backing sheet are strongly cemented to the flanges to form the assembled work of art which is then painted over parts only of its front face by silk screening or similar technics to provide the complete work of art.

The notice of copyright is then affixed to the completed work of art, the notice comprising an oval-shaped label measuring one inch on its longer axis and three quarters inch on its minor axis and bearing the following notation:

Hand decorated
Coventry Ware, Inc.
© Made in U. S. A.

The notation can be clearly read without a magnifying glass. The label is secured by strong adhesive to the Masonite backing sheet of the work of art and is readily and easily visible to anyone even casually examining the work of art. The label is of contrasting color to the Masonite so that it stands out.

No fault has been found with the notice, merely with the place where the notice is affixed on respondent's wall plaques.

In the District Court the parties both filed Motions for Summary Judgment, and at the hearing on these motions petitioner admitted before the Court and prior to argument that it had copied and did infringe, and that its sole defense was that respondent's notice of copyright was not in compliance with the statute. The Court of Appeals for the Second Circuit in its decision in the case at bar (pp. 20-25, *infra*) has sharply denied this defense.

ARGUMENT.

1. Copyright Notice Under Title 17 U. S. C. Sec. 10. Section 10, Title 17, Copyrights, U. S. C. reads in its entirety as follows:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title. July 30, 1947, c. 391, Sec. 1, 61 Stat. 652."

This portion of the statute covers notice generally. It requires only that "such notice shall be affixed to each copy thereof published or offered for sale." In the instant case respondent's notice of copyright is "affixed to each copy." There is *no* requirement in this section as to *where* the notice is placed so long as it is affixed to each copy.

2. Copyright Notice Under 17 U. S. C. Sec. 20. Section 20, Title 17 U. S. C. reads as follows:

> "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice. July 30, 1947, c. 391, Sec. 1, 61 Stat. 652."

Thus, the statute very specifically states *where* the notice must be affixed with respect to books, printed publications, periodicals, and musical works.

There is *no* such specific provision in any of Sections 10, 19 or 20 as to *where* notice must be affixed to a work of art, and the broad provisions of merely "affixing the notice to each copy" of Section 10 certainly apply. If respondent's wall plaque in its entirety, that is in its fully assembled form, with the molded plastic facing sheet, the stiff backing sheet, the spacers and the painting all cemented into assembled and unitary form constitutes the work of art, as it does, then notice has been applied thereto in full compliance with the statute.

3. To Accept Petitioner's Argument Would Necessitate Dissecting Works of Art. Petitioner contends that only the thin molded plastic front of respondent's integral plaque is the work of art. To dissect the integral whole of respondent's wall plaque destroys the plaque and becomes ridiculous. It would lead to some ridiculous situations. For example, in the statue of David, by Michelangelo, a beautiful sculptured figure of David stands on a small pedestal which is no part of David but is pleasingly coordinated with and secured to David so that David stands up without falling down. The pedestal or base actually is, we believe, part of the work of art. Now assume David is made and sold in a size, as we have all seen it, only a foot high. Petitioner argues, in effect, a copyright notice would have to be put on David himself. Would it be put across his chest, the small of his back, or where? Wherever it would be placed on David it would deface the statue. Petitioner argues that notice could not be put on the pedestal.

We do not think this is the law, nor should it be the law. To so hold sets up impractical and unworkable standards.

That petitioner's contention is not the law is evident from another example. This is the adequacy of the form of notice used in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 12 U. S. P. Q. 156. In this case fabric was registered as a work of art under Section 5(h). In describing the notice the Court said:

> "The cloth, so 'converted,' bears upon its edge at each repetition of the design printed 'notices' of copyright which are concededly adequate under the Copyright Law."

In other words, in this case the notice was on the margin of the fabric and it was held satisfactory. But applying the rule as proposed by petitioner in the case at bar the copyright notice would have had to be placed on the work of art itself which literally would mean over-printing on the design printed on the cloth. This was not the rule of law in *Peter Pan v. Martin Weiner* (*supra*). See also *Peter Pan Fabrics, Inc. et al., v. Dixon Textile Corp.*, 125 U. S. P. Q. 39 (C. C. A. 2d, 1960).

Nor was it the rule of law in *Peter Pan Fabrics, Inc. v. Acadia Co., Inc.*, 121 U. S. P. Q. 81 (D. C. S. D. New York, 1959), also holding valid the printing of a copyright notice on the margin or selvage edge of fabric bearing a design copyrighted as a work of art. In this case the Court said:

> "the copyrightee, having done all that is reasonably within his power to imprint the notice on the material without marring the appearance of the work, has satisfied the notice requirements of section 10."

3(a). Notice of Copyright Should Not Deface a Work of Art. It is well recognized by artists and designers that placing the notice of copyright on the face of a work of art often disfigures, defaces and detracts therefrom. Take in

the case at bar. No one will deny that if respondent had placed its notice of copyright on the face of its wall plaques the notice would become highly objectionable when the plaque was hung in a private home, an office, or anywhere except possibly respondent's sales office. Equally objectionable would be any requirement to disfigure a map by printing the notice on the map and not the margin, or putting a copyright notice on a statue itself, such as the figure of David, rather than on a pedestal supporting the statue. Or in the *Peter Pan* case (*supra*) placing the notice on the design and not on any margin or selvage edge.

See also, *Trifari, Krussman & Fishel, Inc. v. Charel Co., Inc. et al.*, 107 U. S. P. Q. 48 (D. C. S. D. New York, 1955), involving placing a copyright notice on a work of art. The Court said:

> "The nature of the copyrighted article is such that the area in which the notice may be placed is necessarily limited. It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements. See Shapiro, Bernstein & Col, Inc. v. Jerry Vogel Music Co., Inc., 161 F. 2d 406 (C. C. A. 2nd, 1946)."

3(b). The Work of Art Is the Complete Assembly. The District Court in discussing the facts in the case at bar said (15a) in speaking of respondent's wall plaques:

> "The wall plaques were designed as decorative features for walls. They were made by having a mold pressed in plastic. The plaques had a unique and artistic design on them and were completed with a plaster board backing *so that the component parts formed an integral whole* which could be used for decorative purposes." (Emphasis ours.)

It is a fact that the integral whole of all the assembled parts form the work of art. Any thought that the thin plastic facing alone is the work of art is unsound. The plastic facing alone is so flimsy and weak that it could not be successfully sold or practically hung on the wall. An opening door would blow it off the wall.

Only after the thin plastic face sheet is permanently secured by strong cement to the backing sheet of stiff Masonite with interposed spacer cups cemented firmly in place is the complete integral whole produced which is the salable work of art constituting respondent's wall plaque. The notice of copyright when affixed to the stiff backing of Masonite is thus affixed to the work of art and not to a back secured to the work of art.

In the *Peter Pan* cases (*supra*, 7) it was recognized by the Courts that "the works of art" were the base fabric, plus the printing thereon, and leaving a selvage edge or margin which received the copyright notice. Petitioner would argue that the printing alone was "the work of art."

In the case of David, by Michelangelo, "the work of art" is the figure of David, plus the base or pedestal on which the figure stands. Petitioner would argue that the figure alone is "the work of art."

In the recent decision of Dawson, *J.*, in *Syracuse China Corporation v. Stanley Roberts*, 125 U. S. P. Q. 62 (D. C., S. D. N. Y., Feb. 2, 1960), the Court held valid and infringed a copyright on dinnerware called "Blue Mist." The china itself was of ordinary and known style and form, and the printed-on artistic design appears only on the front center portion of the dishes. The copyright notice was applied to the back or base of the china. The complete assembly of plate, dish or other china, plus the artistic design on the front was nonetheless "the work of art."

Each of respondent's plaques forms a unitary and integral work of art even as a copyrighted plate, glassware, sculpture, figurine, or printed cloth might be so considered. Attempts to dissect all such works of art, including the plaque, would, of course, result in their breakage or destruction. The plaques as sold are complete and finished products and are, as the Court below stated, integral wholes.

4. A Statute Should Be Liberally Interpreted to Effect Justice and Equity. In the instant case we have a most flagrant and piratical example of copyright infringement.

Apparently seeking to find some justification for its action, Sidney A. Harris, office manager for petitioner, filed an affidavit from which the lower court quoted the following in its opinion (16a):

> "At no time prior to notification from the plaintiff was deponent or defendant aware of any claim to copyright by plaintiff. Whether such lack of awareness resulted from failure closely to scrutinize plaintiff's works so purchased or from the absence of any copyright notice thereon deponent is unable to say * * *
>
> "In any event, deponent fully admits that defendant's works were created by using said copies of plaintiff's works as models * * *"

Thus, although admitting copying, which required close scrutiny, petitioner's officer had the audacity in his affidavit to imply that lack of awareness (of copyright notice) resulted either from failure to closely scrutinize or from lack of copyright notice and he was unable to say which because all five or more of respondent's plaques which he purchased and copied have now been lost or mislaid. It is self-evident that anyone like Mr. Harris working

every day in the field of artistic objects subject to copyright would or should closely examine from stem to stern any object copied, particularly when this involved merely turning respondent's wall plaque over in order to clearly see the notice thereon. There are strong implications here of reckless disregard for the rights of others and a disregard for language used in an affidavit.

Washington Publishing Co. v. Pearson, 306 U. S. 30 (1939), is full authority that a liberal interpretation of the copyright statute is in order. The Court said:

> "The Act of 1909 is a complete revision of the copyright laws, different from the earlier Act both in scheme and language. It introduced many changes and was intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; to afford greater encouragement to the production of literary works of lasting benefit to the world."

The Court also said:

> "* * * To give section twelve a more drastic effect would tend to defeat the broad purpose of the enactment."

The Court then proceeded to hold that the deposit of copies with the Copyright Registrar fourteen months after publication complied with the requirement of the statute to deposit copies "promptly."

In the instant case we ask for no such liberal interpretation of the statute but merely for a common sense interpretation to see that the intent and purpose of the statute is achieved.

In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp., supra,* p. 7, the Court, through Judge Hand, said:

> "Therefore, if we construe the words of Sec. 10 with relentless literalism, dresses made out of the 'converted' cloth may be said to be 'offered for sale' without any effective notice. * * *

> "On the other hand, it is commonplace that a literal interpretation of the words of a statute is not always a safe guide to its meaning. Indeed, in extreme situations this doctrine has been carried so far that language inescapably covering the occasion has been disregarded when it defeats the manifest purpose of the statute as a whole. Holy Trinity Church v. United States, 143 U. S. 457; Markham v. Cabell, 326 U. S. 404 * * *"

The Court then proceeded to find the notice of copyright adequate.

We believe the petitioner seeks in the case at bar to defeat the manifest purpose of the statute as a whole by a "relentless literalism."

See also, the "Betty Boop" copyright case of *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 23 U. S. P. Q. 295 (C. C. A. 2d, 1934), in which the Court said:

> "The purpose of the statute's requirement as to notice is to prevent innocent persons who are unaware of the existence of the copyright from suffering for making use of the copyrighted article. W. H. Anderson v. Baldwin Law Pub. Co., 27 F. (2d) 82 (C. C. A. 6); Stecher Lith. Co. v. Dunston Litho. Co. (D. C.) 233 F. 601. A reasonable construction of the statutory requirements shows that the name of the copyright proprietor, is sufficient in form, if it gives notice of copyright to one who is looking for the truth and who desires to avoid infringement."

5. Prima Facie Validity of Copyright. The Registrar of Copyrights, Library of Congress, carefully screens each application for copyright including, but not limited to, the examination of the notice of copyright thereon. If the application is not in compliance with the statutory requirements as to notice and otherwise the registration is refused. In the instant case, no fault was found by the skilled Registrar and his assistants with respondent'

notice of copyright on its wall plaques and proper formal Copyright Registrations were granted. This fact should be given due weight.

On this point, in the copyright case of *Stein et al. v. Mazer*, 97 U. S. P. Q. 310 (C. C. A. 4th, 1953), Judge Dobie said:

> "When an agency of the United States is empowered by a federal statute to issue regulations under, and also to administer and apply, that statute, and when the agency over a course of years applies that statute in a certain way, that application should be given great weight when a court is called upon to determine the meaning of the statute. Cf. Commissioner v. Southern Texas Lumber Co., 333 U. S. 496, 501; Merchants National Bank of Boston v. Commissioner, 320 U. S. 256, 260; Textile Mills Securities Corp. v. Commissioner, 314 U. S. 326, 338, 339."

In this case of *Stein et al. v. Mazer*, the Court found valid and infringed copyrights on works of art, namely male and female dancing figures, converted into use as lamps.

See, also, "The Copyright Law," published 1952 (Bureau of National Affairs, Washington, D. C.) by Herbert A. Howell, former Assistant Registrar of Copyrights, bottom of page 37:

> "Inasmuch, however, as under Section 10 the issuance of the certificate is conditioned upon 'compliance' with all requirements of the Act, including publication with the prescribed notice, the Copyright Office will not make registration unless the copies deposited bear such notice. Any certificate now issued for such material includes a statement that 'such copies bore the statutory notice of copyright.' "

6. Affixing of Notice. Section 10 of Title 17 states simply that "notice shall be affixed to each copy." This is exactly what respondent did in affixing the label bearing

the notice with adhesive to the work of art. Petitioner even cites the dictionary meanings of the word "affix" as to "fix or fasten in any way; to attach physically" and as an example cites, as "*to affix a stamp to an envelope*, one's signature to a document." This dictionary reference clearly answers and refutes petitioner's argument. Respondent's notice is under the statute "affixed" to the work of art precisely as a stamp is "affixed" to an envelope.

We quote with approval from the decision of the Court of Appeals in the case at bar:

> "Defendant also suggests that the notice, having been pasted on by a gummed label, was not 'affixed' within the meaning of section 10. We find that it was 'affixed.' The point does not require discussion."

7. The History of the Copyright Act—Title 17 U. S. C.

An excellent outline of the pertinent legislative history relating to copyright notice appears in "Copyright Law Revision Studies; Studies 7-10 (7—Notice of Copyright)" and published in 1960 by the Government Printing Office, is as follows:

(Page 7):

> "The next general revision statute, the act of July 8, 1870, made certain technical amendments in the notice provisions, but did not change the basic requirement:
>
> 'Sec. 97. *And be it further enacted,* That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon

some portion of the face or front thereof, *or on the face of the substance on which the same shall be mounted*, the following words, viz.: "Entered according to act of Congress, in the year ___, by A. B., in the office of the librarian of Congress, at Washington." ' " (Second emphasis ours.)

"Under the act of August 1, 1882, 'manufacturers of designs for molded decorative articles, tiles, plaques, or article of pottery or metal subject to copyright' were permitted to place the notice as follows:

'* * * *upon the back or bottom of such articles*, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon.' " (Emphasis ours.)

* * *

* * *

"III. The Present Law in the United States.

"A. Provisions of the Present Law.

"*The notice requirements of the present law are essentially the same as those incorporated in the act of March 4, 1909.* In general, each copy of a work 'published or offered for sale in the United States by authority of the copyright proprietor' must bear a copyright notice in the prescribed form and position." (Emphasis ours.)

* * *

* * *

(Page 9):

"B. Legislative History of the Present Provisions"

* * *

* * *

"The legislative history of the act of 1909 contains little of significance concerning the philosophy underlying the notice provisions. The basic elements of the

present notice requirement were already present in H. R. 19853, which was introduced by Representative Currier on May 31, 1906, and which was the first of the series of bills which led to the 1909 statute; the changes in the provisions which were finally enacted, and the relatively few comments on them during the hearings, dealt largely with matters of detail."

(Page 11):

"Only two changes in the basic notice provisions have been made since 1909. The first, a technical amendment made at the time of the codification of the copyright law in 1947, simply involved a change in language. The second, which was a part of the legislation enacted in 1954 to permit U. S. adherence to the Universal Copyright Convention, allows use of the symbol C instead of 'Copyright' or 'Copr.' in the notice for all types of works; before September 16, 1955, the effective date of the amendment, use of the symbol was permissible only for pictorial, graphic, and sculptural works."

Respondent accordingly fails to find any justification or valid reason for variance of the law by inference or legislative history.

The Court of Appeals for the Second Circuit in the case at bar also carefully reviewed the legislative history of the Copyright Acts and after over two full pages of discussion concluded:

"In the light of this legislative history it is surely incredible that Congress would have intended, by implication hidden in Section 19, to revive the requirement of the 1802 and 1831 acts that notice appear on the front. All the copyright legislation of the nineteenth century had prescribed in unambiguous terms the permissible location of notice, and the 1909 revision contained a section dealing specifically with the location of notice and prescribed such location only for three types of items. Thus the failure to limit the

placement of notice for other items does not arise from any lack of familiarity with the drafting devices necessary to accomplish that result. Section 19 should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.

"Defendant's restrictive view of Section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the 'front' of the work of art. This Court and the District Court for the Southern District of New York have recently rendered a number of decisions upholding copyrighted works of art on dress fabric where the notice appeared on the selvage or margin of the fabric, rather than on the design itself. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487; *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 2 Cir., 280 F. 2d 800 802; *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, D. C. S. D. N. Y., 187 F. Supp. 334; *H. M. Kolbe Co. v. Armgus Textile Co.*, D. C. S. D. N. Y., 184 F. Supp. 423, affirmed 2 Cir., 279 F. 2d 555. We have also sustained a copyright on a pair of earrings, though the notice was stamped upon only one earring of a pair. *Boucher v. DuBoyes, Inc.*, 2 Cir., 253 F. 2d 948, *certiorari denied 357 U. S. 936.* In *Scarves by Vera, Inc., v. United Merchants and Mfrs., Inc.* D. C. S. D. N. Y., 173 F. Supp. 625, works of art contained on ladies' blouses were copyrighted by a notice upon a label sewed into a side seam. Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, D. C. S. D. N. Y., 134 F. Supp. 551, 554, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: 'It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements.' See also *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 2 Cir.,

161 F. 2d 406, *certiorari denied 331 U. S. 820; Fleischer Studios v. Ralph A. Freundlich, Inc., 2 Cir. 73 F. 2d 276, Certiorari denied Ralph A. Freundlich, Inc. v. Fleischer Studios, 294 U. S. 717.*" (Emphasis ours.)

8. Certiorari Denied in Previous Copyright Cases Involving Notice—Note that certiorari has been denied in three cases involving Notice of Copyright, and relied on in the decision of the Second Circuit Court of Appeals in the case at bar. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 331 U. S. 820; *Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717; and *Boucher v. Du-Boyes, Inc.*, 357 U. S. 936.

CONCLUSION.

For the reasons set forth, common sense, law and equity have been well served in the decision of the Court of Appeals for the Second Circuit in the case at bar (pp. 20-25, *infra*). *Petitioner attempts to muddy waters that are already clear, and have been clear for fifty years.* Petitioner seeks to impose impractical and unworkable standards when they are not needed and are contrary to the express provisions of Title 17 U. S. C.

There is no conflict of law. There is no constitutional question. There is no real question under Rule 19(1)(b) of the Rules of this Court with respect to an important question of federal law which has not been, but should be, settled by this Court.

The petition for the writ of certiorari should be denied.

Respectfully submitted,

ALBERT H. OLDHAM OF OLDHAM & OLDHAM,
825 First National Tower,
Akron, Ohio,
Counsel for Respondent.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—October Term, 1960.

(Argued February 16, 1961 Decided April 3, 1961.)

Docket No. 26643

COVENTRY WARE, INC.,
Plaintiff-Appellant,

vs.

RELIANCE PICTURE FRAME COMPANY,
Defendant-Appellee.

BEFORE:

LUMBARD, *Chief Judge*, and
CLARK and SMITH, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Archie O. Dawson, *Judge.*

Plaintiff Coventry Ware, Inc., appeals from a summary judgment for defendant Reliance Picture Frame Company in an action for infringement of plaintiff's copyrighted sculptured wall plaque. Judgment reversed and action remanded. Opinion below reported in D. C. S. D. N. Y., 186 F. Supp. 798.

JAMES B. BOYER, New York City (Albert H. Oldham, of Oldham & Oldham, Akron, Ohio, on the brief), *for Plaintiff-Appellant.*

RAYMOND A. WERCHEN, New York City, *for Defendant-Appellee.*

CLARK, *Circuit Judge*:

Plaintiff, a corporation engaged in the manufacture and sale of wall plaques, caused certain wall plaques to be designed by an artist and then registered them as "Molded Sculpture" with the Register of Copyrights. The plaques contained a colored, three-dimensional, but relatively flat, design, and were intended as decorative features for walls. The plaques were made by pressing a mold in plastic, and were completed with a rigid backing sheet so that the component parts formed an integral whole which could be attached to a wall and displayed. Defendant admitted copying plaintiff's plaques and selling them at a lower price. In this action for infringement, its only defense is the alleged invalidity of the copyright notice, which appeared on a small printed label firmly attached to the back of the plaques. Defendant's position is that notice of copyright must appear on the front of the work of art, and that a notice appearing on the back is insufficient. The district court, accepting this contention, granted summary judgment to the defendant, and plaintiff appeals. Judge Dawson's opinion is reported in D. C. S. D. N. Y., 186 F. Supp. 798.

The relevant sections of the Copyright Act, 17 U. S. C. §§ 1 *et seq.*, are section 10, section 19, which deals with form of notice, and section 20, which prescribes the location of the notice in certain instances. The basic notice requirement is set forth in 17 U. S. C. § 10, as follows:

> "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof * * *."

The form of the notice required by section 10 is set forth in 17 U. S. C. § 19 and "shall consist either of the word 'Copyright,' the abbreviation 'Copr.,' or the symbol ©, ac-

companied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication."

Section 19 then goes on to authorize an optional "short form" of notice which may be used on works of art and other items set forth in 17 U. S. C. § 5(f)-(k) as an alternative to the general form of notice described above. Such "short form" notice "may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided,* That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear."

Section 20 prescribes the place where the notice is to appear in the case of books or other printed publications, periodicals, and musical compositions. It places no limitations on the possible location of notice in the case of works of art and kindred items, provided that the notice complies with the general requirement of section 10 that the notice be affixed to each copy. Defendant contends, however, that a limitation on the permissible location of notice for works of art may be found by implication from section 19. Defendant reasons that the short-form notice allowed by section 19 is intended to minimize the disfigurement which would result if the long form were used. In order to prevent the short form from being mere surplusage, defendant concludes, we must assume that the long form could be used only where it disfigured the work of art—i.e., on the front. Defendant does not explain, however, why Congress would have enacted a copyright law requiring disfiguring notices on the front when a nondisfiguring notice on the back would give equally adequate warning to

prospective copyists. Neither does defendant say why, if any limitations on placement were intended with respect to works of art, they were not set forth in section 20, whose specific subject is location of the notice.

It should be noted that section 20 is the culmination of a long history of increasing liberalization of restrictions on the placement of notice. In the case of books and musical compositions, the placement of notice has always been rigidly and narrowly confined. But in the case of other items, a series of revisions have steadily expanded the permissible locations of notice. The acts of 1802, 2 Stat. 171, and of 1831, 4 Stat. 436, 437, both required notice to be "on the face" of nonbook and nonliterary items. This harshly restrictive requirement was abated slightly in the revision of 1870, 16 Stat. 198, 214, which provided that in the case of "a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statute, statuary, or model or design intended to be perfected and completed as a work of the fine arts," the notice must be placed "upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted."

The act of 1874, 18 Stat. 78, 79, completely eliminated all references to "face or front," and required instead only that in the case of the items specified above the notice appear "upon some visible portion thereof, or of the substance on which the same shall be mounted." Even this liberalized requirement was apparently thought too restrictive, however, since Congress added a special section in 1882, 22 Stat. 181, permitting "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright" to place the notice "upon the back or bottom of such articles, or in such other place upon them as it has heretofore been

usual * * * to employ for the placing of * * * trade marks thereon."

The original House and Senate bills leading to the Copyright Act of 1909 continued the century old practice of prescribing the possible location of notice, but they expanded still further the number of such locations. Section 14 of H. R. 19853 and S. 6330, 59th Cong., 1st Sess. (1906), provided that in the case of maps, works of art, models or designs for works of art, reproductions of a work of art, etc., the notice "shall be applied * * * upon some accessible portion of the work itself or of the margin, back, permanent base or pedestal thereof, or of the substance on which the work shall be mounted." In the act as finally passed, however, 35 Stat. 1075, 1079 (1909), a specific requirement for location of notice was retained only in the case of books or other printed publications, musical compositions, and periodicals. All other items were left subject only to the general requirement, now embodied in 17 U. S. C. § 10, that notice be affixed to each copy.

In the light of this legislative history it is surely incredible that Congress would have intended, by implication hidden in section 19, to revive the requirement of the 1802 and 1831 acts that notice appear on the front. All the copyright legislation of the nineteenth century had prescribed in unambiguous terms the permissible location of notice, and the 1909 revision contained a section dealing specifically with the location of notice and prescribed such location only for three types of items. Thus the failure to limit the placement of notice for other items does not arise from any lack of familarity with the drafting devices necessary to accomplish that result. Section 19 should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.

Defendant's restrictive view of section 19 is also inconsistent with a large body of judicial authority upholding notices which are not on the "front" of the work of art. This court and the District Court for the Southern District of New York have recently rendered a number of decisions upholding copyrighted works of art on dress fabric where the notice appeared on the selvage or margin of the fabric, rather than on the design itself. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 2 Cir., 274 F. 2d 487; *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 2 Cir., 280 F. 2d 800, 802; *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, D. C. S. D. N. Y., 187 F. Supp. 334; *H. M. Kolbe Co. v. Armgus Textile Co.*, D. C. S. D. N. Y., 184 F. Supp. 423, affirmed 2 Cir., 279 F. 2d 555. We have also sustained a copyright on a pair of earrings, though the notice was stamped upon only one earring of a pair. *Boucher v. Du Boyes, Inc.*, 2 Cir., 253 F. 2d 948, certiorari denied 357 U. S. 936. In *Scarves by Vera, Inc. v. United Merchants & Mfrs., Inc.*, D. C. S. D. N. Y., 173 F. Supp. 625, works of art contained on ladies' blouses were copyrighted by a notice upon a label sewed into a side seam. Perhaps the best summary of the applicable principle may be found in the decision of Judge Bicks in *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, D. C. S. D. N. Y., 134 F. Supp. 551, 554, enjoining the copying of costume jewelry, copyrighted as a work of art, where the notice appeared on the clasp. He stated: "It is so located, however, as to apprise anyone seeking to copy the article, of the existence of the copyright and is, therefore, sufficient to satisfy the statutory requirements." See also *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 2 Cir., 161 F. 2d 406, certiorari denied 331 U. S. 820; *Fleischer Studios v. Ralph A. Freundlich, Inc.*, 2 Cir., 73 F. 2d 276, certiorari denied *Ralph A. Freundlich, Inc. v. Fleischer Studios*, 294 U. S. 717.

Defendant also suggests that the notice, having been pasted on by a gummed label, was not "affixed" within the meaning of section 10. We find that it was "affixed." The point does not require discussion.

On remand it would seem appropriate that the court grant the plaintiff's motion for summary judgment, since the defendant has admitted copying plaintiff's plaques. We shall leave to the district court the settling of appropriate remedies.

Judgment reversed and action remanded for proceedings in accordance with this opinion.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUN 17 1961
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ~~934~~ 104

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

—against—

COVENTRY WARE, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

RAYMOND A. WERCHEN
141 Broadway
New York 6, N. Y.
Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 984

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

against

COVENTRY WARE, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

Statement of Additional Facts

Respondent argues (Resp. Brief p. 3) that it is evident petitioner killed respondent's business in the items in question.

There is no factual showing in the record of respondent's unit or dollar sales of the items involved, either before or after the alleged infringements. On the contrary, the record shows that for the period in question, respondent's gross sales increased by 20% (R. p. 25a).

ARGUMENT IN REPLY

Petitioner does not seek to upset the provisions of 17 U.S.C. § 10; rather, to have them applied according to their apparent intendment.

(Answering Respondent's 1, 2 and 3)

The crucial question is: what is the copy of the work; is it the original design of the creating artist or the utilitarian implementation of that design for commercial purposes?

The composition backing of the works in question here are no more a part of the work of art than the brace over which a painter stretches and nails the canvas on which his work of art is to be created. The brace device is mechanical merely.

Petitioner does not contend for dissection of respondent's plaque, but that it be marked with the notice of copyright in compliance with the statute.

Precisely to minimize possible disfigurement does the statute (17 U.S.C. §19) provide for an alternative form of notice with respect to such works of art. Respondent did not avail itself of the opportunity for such alternative marking.

With respect to sculptured figures, one need only examine the busts of some of the deceased Chief Justices of this court, positioned in the main lobby of this courthouse, to observe the name of the sculptor on the bust itself. Such marking rather than defacing the work honors both the figure and its creator.

As Judge Dawson observed in dismissing respondent's action in the District Court, the component parts of the plaque formed an integral whole for decorative purposes, a utilitarian or mechanical aspect with which the statute is not concerned (37 C.F.R., CH. II, §202.8 (a)).

Interestingly, Judge Dawson, in *Syracuse China Corp.* v. *Stanley Roberts* (Resp. Brief, p. 9), had, prior to his decision herein, held valid and infringed a copyright of a dish or plate with a copyright notice on the reverse side. The positioning of the name of the maker on the reverse side of a dish, as with a spoon, is in accord with universal custom and usage. Patently, the copyright considerations applicable to a kitchen utensil are far removed from a work of fine arts.

It would seem that the express designation in 17 U.S.C. §20 as to where the copyright notice should appear on books, printed publications, periodicals and musical works was a practical necessity to avoid mischief in the application of the statute with respect to such works.

And probably, because of the numerous kinds of works in the other categories of copyrightable subjects (17 U.S.C. §5), and the dimensional differences among them, the statute makes no express designation where the notice shall appear on them, to avoid similar mischief.

Petitioner's view of the statute is in accord with universal custom and usage.

(Answering Respondent's 4)

It is not difficult to understand how a person like petitioner's office manager, Sidney A. Harris, dealing daily in works of art of the type here involved, would concern himself with scrutiny of the face of such works only, the place where in the experience of such a person, the notice of copyright ought to be.

Obviously, to such a person, the label on the composition backing would appear to be only a trade emblem, particularly in view of the Old English style of print therein contained.

Moreover, it is not too difficult to perceive that an attorney, relying upon an interpretation of the statute as contended for by petitioner, in the conduct of an infringement case, might well stipulate to essential allegations of fact in a complaint, such as claimed originality of the work and presence of the notice of copyright on each copy thereof published or offered for sale; whereas, were there authority as to the interpretation of the statute contrariwise, he would strenuously contest such allegations.

Conclusion

For all of the reasons stated herein, and in the petition for writ of certiorari, a federal question which has not been settled by this court is presented, and the Writ should be granted.

Respectfully submitted,

RAYMOND A. WERCHEN
Counsel for Petitioner

Office-Supreme Court, U.S.
FILED
OCT 18 1961
JAMES R. BROWNING, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 104

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

v.

COVENTRY WARE, INC.,

Respondent.

PETITION FOR REHEARING

RAYMOND A. WERCHEN,
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No. 141 Broadway,
New York City.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 104

RELIANCE PICTURE FRAME COMPANY,

Petitioner,

v.

COVENTRY WARE, INC.,

Respondent.

PETITION FOR REHEARING

Petitioner presents its petition for a rehearing of this Court's order dated October 9, 1961, denying the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, and, in support thereof, respectfully urges:

Grounds for Rehearing

The petition for certiorari was denied, without opinion.

Filed with the petition for certiorari in this copyright infringement action is a duly certified exhibit of a plaque which purports to contain a notice of copyright in conformity with the requirements of the Copyright Statute.

The conformity of the notice on the plaque with such requirements is the essence of this controversy.

In the absence of an opinion, it is not known whether the members of the Court made a visual examination of the filed plaque before their determination of the petition for certiorari.

If such visual examination was made, then petitioner has had its full day in court and this petition for rehearing should be denied.

But if no such visual examination was made, then the Court's determination may be a frustration, even though inadvertent, of the deliberative judicial process in which the petitioner placed its faith for approbation or condemnation of its actions.

The plaque and the petition for certiorari are as one, and the questions presented in that petition cannot be fully appreciated, except in the visual perspective of the plaque.

For analogy, it is as the brief and record of the testimony after a full trial. The plaque is the vital "testimony" in this case.

It is respectfully urged, as set forth in the petition for certiorari, that the plaque does not contain a notice of the quality upon which the Copyright Statute ought to grant a monopoly.

Accordingly, if there was no visual examination of the plaque, such omission would seem to constitute an intervening circumstance of substantial effect upon which a petition for rehearing should be granted.

Conclusion

It is respectfully urged that the petition for rehearing be granted and that, upon further consideration, a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

RAYMOND A. WERCHEN
Counsel for Petitioner

Certificate of Counsel

I, RAYMOND A. WERCHEN, counsel for the above-named petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58, subdivision 2, of the Rules of this Court.

RAYMOND A. WERCHEN
Counsel for Petitioner

October 17, 1961